SERVED: June 7, 2007

NTSB Order No. EA-5290

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 5th day of June, 2007

MARION C. BLAKEY, Administrator, Federal Aviation Administration, Complainant, v. RANDALL J. OPAT, Respondent.	Docket SE-17074

OPINION AND ORDER

The Administrator appeals the oral initial decision of Chief Administrative Law Judge William E. Fowler, Jr., issued on January 10, 2006.[1] By that decision, the law judge dismissed the

[1] A copy of the initial decision, an excerpt from the hearing transcript, is attached.

Administrator's complaint, which had ordered a 90-day suspension of respondent's airline transport pilot certificate based on alleged violations of 14 C.F.R. §§ 91.7(a) and (b),[2] and 91.13(a).[3] We deny the Administrator's appeal.

The Administrator's March 18, 2004 order functions as her complaint against respondent, and alleges that respondent was the pilot-in-command (PIC) of a Gulfstream IV aircraft on August 7, 2002, at Harrisburg International Airport in Harrisburg, Pennsylvania. The Administrator alleges that, before landing at Harrisburg, the aircraft's landing gear indicator light failed to illuminate. As a result, respondent notified personnel in the air traffic control (ATC) tower and requested that they visually check the landing gear to determine whether it was down. The Administrator also alleges that respondent took additional steps, which we will discuss below, to ensure that the gear was in place prior to landing. Upon landing, the complaint alleges that respondent directed a

[2] Section 91.7(a) provides that, "no person may operate a civil aircraft unless it is in an airworthy condition." Subsection (b) of the same section provides that the pilot-in-command (PIC) of an aircraft is responsible for determining that the aircraft is in a condition for safe flight, and that the PIC must discontinue the flight when the aircraft encounters unairworthy mechanical, electrical, or structural conditions.

[3] Section 91.13(a) provides that, "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

mechanic at Harrisburg to safety-wire and pin the landing gear in place, so that respondent could continue his planned flight to Westfield, Massachusetts. The Administrator alleges that respondent's operation of the aircraft with the landing gear wired and pinned in a down position, in the absence of a ferry permit,[4] violated 14 C.F.R. §§ 91.7 and 91.13(a).

The law judge held an evidentiary hearing on January 10, 2006, at which the Administrator presented the testimony of the mechanic on duty at Harrisburg during the events at issue, Mr. Joseph Basso, and an aviation safety inspector who was closely familiar with the case, Mr. James Pool. Respondent presented the testimony of Mr. Todd Stoudt, an experienced Gulfstream airframe and powerplant mechanic, who advised respondent over the phone throughout his landing of the aircraft after the indicator light failed to illuminate, and who assisted with respondent's determination that safety-wiring and pinning the landing gear in place would suffice for respondent's trip to Westfield. Respondent also provided his own testimony, as well

[4] Operators may obtain a special airworthiness certificate, also known as a "ferry permit," from an FAA Flight Standards District Office, when the aircraft does not conform to the specifications in its type certificate. The Administrator's issuance of a ferry permit may provide operational limitations to ensure safety, and allows the operator to operate the aircraft on a temporary basis.

as the testimony of his co-pilot during the flight in question, Mr. Michael Steers.

The law judge dismissed the Administrator's complaint, based on the fact that respondent proceeded cautiously and obtained verification from experts that the aircraft was airworthy, despite the failure of the landing gear light and the fact that respondent had used gear pins to secure the landing gear. In particular, the law judge found that the problem with the landing gear light arose out of a fairly common discrepancy with the aircraft's cannon plug. Tr. at 239. The law judge determined that the failure of the indicator light to illuminate did not adversely affect the safety of the aircraft, because the aircraft was equipped with two other types of warnings (an additional auditory warning and a visual warning) that would indicate that the landing gear was failing to deploy. With regard to respondent's decision to safety-wire and pin the landing gear in place for his flight to Westfield, the law judge concluded that respondent did not ensure that the aircraft conformed to its type certificate, but was nonetheless safe for flight. Id. As a result of these conclusions, the law judge dismissed the Administrator's complaint. On appeal, the Administrator argues that the law judge's conclusions are not

consistent with Board precedent and policy, and respondent urges us to affirm the law judge's dismissal.

In reviewing the law judge's decision and considering the Administrator's appeal, we emphasize that the Administrator has the burden of proving that the aircraft was unairworthy by a preponderance of the evidence. Administrator v. Van Der Horst, NTSB Order No. EA-5179 at 3 (2005) (recognizing that the Administrator has the burden to prove that an aircraft is not airworthy in order to prevail on her allegation that the respondent violated 14 C.F.R. § 91.7(a), and holding that the Administrator, "did not prove this key fact"); Administrator v. Schwandt, NTSB Order No. EA-5226 at 2 (2006) (stating that it is the Board's role "to determine, reviewing the evidence [the Administrator] presents, whether she has met her burden of proof").

In cases in which the Administrator alleges that an operator has violated 14 C.F.R. § 91.7, we have long held that the standard for airworthiness consists of two prongs: (1) whether the aircraft conforms to its type certificate and applicable Airworthiness Directives; and (2) whether the aircraft is in a condition for safe operation. Administrator v. Doppes, 5 NTSB 50, 52 n.6 (1985) (citing 49 U.S.C. § 1423(c)); see also Administrator v. Anderson, NTSB Order No. EA-3976 at 2

(1993); Administrator v. Nielsen, NTSB Order No. EA-3755 at 4 (1992); Administrator v. Copsey, NTSB Order No. EA-3448 (1991). We have recognized that, "the term 'airworthiness' is not synonymous with flyability." Doppes, supra, at 52 n.6. We have also concluded, however, that when small, insignificant deviations are present, an aircraft may still substantially conform to its type design. Administrator v. Frost, NTSB Order No. EA-4680 (1998); Administrator v. Calavaero, Inc., 5 NTSB 1099, 1101 (1986).[5] In determining whether an aircraft is airworthy in accordance with the aforementioned standard, the Board considers whether the operator knew or should have known of any deviation of the aircraft's conformance with its type certificate. See, e.g., Administrator v. Yialamas, NTSB Order No. EA-5111 (2004); Administrator v. Bernstein, NTSB Order No. EA-4120 at 5 (1994).

The Administrator's principal argument for finding that respondent violated 14 C.F.R. § 91.7, and, as a result, § 91.13(a), is based on the fact that respondent operated the aircraft with the landing gear in a pinned position. The Administrator stipulates that respondent's operation of the

[5] Previous Board cases have implied that manuals governing an aircraft's maintenance and flight protocol are also principal components in discerning the aircraft's FAA-approved type design. See Frost, supra, at 1 n.3.

aircraft was ultimately safe, but that the condition of the landing gear brought the aircraft out of conformance with its type certificate requirements. Given that the Administrator has the burden to prove the regulatory violations she charges, and the aforementioned two-prong standard for airworthiness, the Administrator must prove that the aircraft either did not conform to its type certificate or was not in a condition for safe operation, in order to prevail. The Administrator has not met this burden in this case. With regard to the second prong, the Administrator conceded that the aircraft was in a condition for safe operation. Administrator's Appeal Br. at 5 (acknowledging that, "the [a]ircraft was in condition for safe flight"). Therefore, the Administrator had the burden to prove that the aircraft did not conform to its type design, as approved under the type certificate. Doppes, supra, at 50. Without proving this key element, the Administrator cannot prevail.

The Administrator introduced the following exhibits into the record in an attempt to prove that the aircraft at issue did not conform to its type design: the aircraft's Type Certificate Data Sheet (Exh. A-4); excerpts from the Gulfstream IV Airplane Flight Manual (Exh. A-5); excerpts from the Gulfstream IV Maintenance Manual (Exhs. A-6 and A-7); and the Gulfstream

Aerospace G-IV Master Minimum Equipment List (Exh. A-8). We have carefully reviewed each of these exhibits in conjunction with the record as a whole, and determined that no part of the record indicates that the aircraft, under the circumstances at issue in this case, did not conform to its type certificate. Perhaps most noteworthy is the fact that the Administrator did not introduce the type certificate itself into evidence, but rather submitted only the Type Certificate Data Sheet. We understand the type certificate to consist of a collection of information about the design of the aircraft, and therefore would expect the type certificate in this case to contain information about the landing gear, or information that would allow us to infer that the landing gear must be retractable. None of the above-listed exhibits include a requirement that the landing gear be retractable. In the absence of the Administrator establishing such a predicate, we find insufficient evidence in the Master Minimum Equipment List alone expressly prohibiting operators from flying the aircraft with the landing gear pinned or fixed. See Tr. at 56 (testimony of Inspector Pool, who stated that he, "[had] not been able to find any text within those documents that describes operating the aircraft with the main landing gear and nose gear in the pinned position"). Overall, none of the Administrator's exhibits in

this case, either alone or in combination, expressly preclude operation of the aircraft with the landing gear in a pinned position.

Without evidence that the aircraft's type design requires that the landing gear be retractable, the record is insufficient for the Board to determine that respondent operated the aircraft when the aircraft did not conform to the requirements in its type certificate. The only evidence that we have located in the record indicating that respondent may have been required to retract the landing gear is a sentence in the Gulfstream IV Maintenance Manual. Exh. A-6 at 1 (stating that, "[i]n flight, the safety requirement is for all gear to be up and locked"). The Administrator has not argued, and we find no case law indicating, that such manuals establish the specifications of an aircraft's type design for purposes of 14 C.F.R. § 91.7.[6] Given this lack of evidence, the Administrator has not met her burden of proving that the aircraft did not conform to its type design.

We emphasize that this opinion is limited to the record on this specific case, and we do not seek to imply or suggest that we condone respondent's actions. We are confident that, had the Administrator's counsel introduced evidence concerning the

[6] See Tr. at 80 (stating that the Gulfstream IV Maintenance Manual in evidence "is not approved by the FAA").

actual type certificate with the type design that identified retractable landing gear as a major system or component, the Administrator would have met her burden of proof. Indeed, we believe respondent should have either grounded the aircraft until it was repaired, ensured that the Minimum Equipment List allowed for the operation of the aircraft without retractable landing gear,[7] or obtained a ferry permit before continuing flight. Although respondent did not take any of these measures, we cannot hold that the aircraft was unairworthy under 14 C.F.R. § 91.7, because the Administrator did not produce evidence reflecting these requirements in the aircraft's type design.

Overall, we affirm the law judge's decision on different grounds, and find that the Administrator failed to meet her burden of proving a violation of 14 C.F.R. §§ 91.7 and 91.13(a),[8]

[7] As stated above, we have reviewed the Master Minimum Equipment List (MMEL), and note that it contains two references to the landing gear: one with regard to its Anti-Skid system, and one with regard to the Nosewheel Steering Accessory Hardware. Exh. A-8 at 32-1. The MMEL does not contemplate or permit operation of the aircraft while the landing gear is in a pinned position.

[8] We also note that the Administrator did not charge respondent with violating 14 C.F.R. § 91.213, which prohibits operators from taking off an aircraft with inoperative instruments or equipment unless the operator fulfills certain conditions. Further, section 91.213 includes conditions such as ensuring that an approved Minimum Equipment List authorizes operation of the aircraft when certain instruments or equipment are inoperative; alternatively, section 91.213 allows for operation

because she did not include evidence in the record to indicate that the type certificate required the landing gear to be retracted or retractable.

ACCORDINGLY, IT IS ORDERED THAT:

The Administrator's appeal is denied.

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.

(..continued)
of aircraft when operators have obtained a special flight permit in accordance with 14 C.F.R. §§ 21.197 and 21.199.